No. 15902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YOICHI FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This is an appeal from Summary Judgment in favor of defendant [R. 42-43].

The complaint is under Section 503 of the Nationality Act of 1940 (8 U. S. C. (1946 Ed.) 903; 54 Stat. 1171) as preserved by Section 405(a), Immigration and Nationality Act of 1952 (note to 8 U. S. C. 1101; 66 Stat. 280) for a declaration pursuant to that section that plaintiff is a national of the United States [R. 26-32].

The District Court had jurisdiction under said sections. The Summary Judgment was filed and entered on December 20, 1957 [R. 43]. Notice of Appeal was filed on December 20, 1957 [R. 44].

This Court has jurisdiction to review the Summary Judgment under 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Statutes.

There are no statutes directly involved in this appeal. The complaint was filed on June 4, 1956 [R. 30]. Defendant thereafter filed a motion to dismiss on the ground of lack of jurisdiction of the subject matter [R. 33-34] apparently bringing into question whether the District Court had jurisdiction under said 8 U. S. C. (1946 Ed.) 903 and Section 405(a) of the Immigration and Nationality Act of 1952 (note to 8 U. S. C. 1101), both of which are set out in the margin.[1] However, before that motion was ruled upon, defendant filed a motion for summary judgment [R. 35-36] on the ground "that there

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[1]8 U. S. C. 903, under which the complaint was filed, provides in pertinent part:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person . . . may institute an action against the head of such Department or agency . . . in the district court of the United States for the district in which such person claims a residence for a judgment declaring him to be a national of the United States . . ."

Section 405a of the Immigration and Nationality Act, 1952 (66 Stat. 166 *et seq.*), the "savings clause" provides in pertinent part (note to 8 U. S. C. 1101):

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes *(sic)*, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

is no genuine issue as to any material fact establishing that the questions presented by the Complaint filed herein have been decided upon the merits by this Court in Civil No. 1300, Yoichi Fugii v. John Foster Dulles." Whereupon the court below considered both motions as "one for summary judgment" [R. 39].

Facts.

Defendant filed no affidavits and there is no refutation nor any question as to the truth of the facts alleged in the complaint.

The complaint (No. 1487 in the Record) alleged, *inter alia,* that plaintiff was born in Honolulu, Territory of Hawaii [R. 26], that he claims Hawaii as his permanent residence [R. 27], that defendant is the Secretary of State of the United States and the head of the Department of State, that the District Court had jurisdiction under 8 U. S. C. 903 and section 405(a) of the Immigration and Nationality Act of 1952 (note to 8 U. S. C. 1101) [R. 27], that plaintiff served in the Japanese Armed Forces and, in 1947, voted in Japan [R. 27]; that plaintiff's military service and his voting was not his free and voluntary act [R. 27]; that in 1948 plaintiff's application to return to the United States was not accepted by the United States Consul in Japan because of the then Occupation [R. 28]; that in November, 1951, plaintiff received a letter from the United States Consul outlining the procedure and documents to be followed by an American citizen of Japanese ancestry resident in Japan who seeks to be registered, or who seeks a passport as an American citizen [R. 28]; that pursuant to that letter he obtained the documents as soon as he could and on October 29, 1952, filed a formal application for passport as an American citizen together with all neces-

sary documents [R. 29]; that the Consul did not act on said application until December 29, 1952, knowing during November and December, 1952 that the Immigration and Nationality Act of 1952 was to go into effect on December 24, 1952 [R. 29]; that on December 29, 1952, the Consul issued to plaintiff a Certificate of Loss of Nationality [R. 29] and that said action was approved by the State Department in Washington, D. C., on July 23, 1953 [R. 30].

The prayer was for a judgment declaring that plaintiff is a National of the United States and that he did not lose his United States citizenship by reason of his service in the Japanese Armed Forces or by reason of his having voted in an election in Japan in April, 1947 [R. 30.]

Thereafter defendant filed a Motion to dismiss on the ground that the Court lacked jurisdiction of the subject matter [R. 33-34]. Before said motion was heard or ruled upon, defendant filed a motion for summary judgment "on the ground that the question presented by the Complaint filed herein have been decided *upon the merits* by this Court in Civil No. 1300, Yoichi Fujii v. John Foster Dulles and that the Defendant is entitled to judgment as a matter of law" [R. 35-36; italics added].

The court below filed a written ruling on the motions to dismiss and for summary judgment [R. 37-41], considering both motions "as one for summary judgment" [R. 39], and ruled that by reason of No. 1300 in that court [R. 40]: "there being no genuine issue as to any material fact, as a matter of law, the defendant is entitled to Summary Judgment" [R. 41] and it granted the motions [ibid.]. In other words, without any evidence having been introduced or heard, and without even an allegation by the Government disputing the facts alleged

in the complaint, or even a suggestion by it that the facts are not true, the court below has, apparently, adjudged, *on the merits,* that plaintiff is not a national of the United States; this, in the face of the undisputed, indeed—admitted—allegation that plaintiff was born in the United States and did not voluntarily serve in the Japanese Armed Forces nor voluntarily vote in Japan.

The proceedings in No. 1300 in the Court below, of which the court took judicial notice [R. 40], was likewise a proceeding in which no evidence was taken and no facts counterweighing plaintiff's allegations were advanced by the Government.

In that case, the complaint, filed on December 23, 1952 [R. 6], alleged, *inter alia,* that plaintiff was born in the United States and claims the Territory of Hawaii as his permanent residence [R. 3]; that defendant, Dulles, is the Secretary of State [R. 3]; that plaintiff served in the Japanese Armed Forces and voted in Japan [R. 4]; that said service and voting were not plaintiff's free and voluntary acts [R. 5]; that prior to the filing of the complaint, plaintiff had executed a petition with the American Consular Service in Japan for a passport to come to the United States as an American Citizen [R. 4]; that the American Consulate had not yet made a determination as to said petition [R. 4]; that the non-action and inexcusable delay on the part of the Consulate is a denial of plaintiff's rights as a citizen of the United States [R. 5]. The prayer asked for a judgment and decree adjudging that plaintiff is a citizen and/or national of the United States and entitled to a passport [R. 6].

On February 11, 1953, defendant filed a motion to dismiss [R. 6-7]. Before this motion was heard, plaintiff filed a motion for leave to file an amended complaint at-

tached thereto [R. 7-10]. Said amended complaint, in contrast to the original complaint which had alleged [R. 4] that no action had been taken by the Consular Service on plaintiff's position for a passport, alleged [R. 9] that the Service had issued to plaintiff a Certificate of the Loss of the Nationality of the United States.

Thereafter the Court granted defendant's motion to dismiss the complaint [R. 46] and allowed 30 days to amend [R. 46].

Within said 30 days [R. 46], plaintiff filed an Amended and Supplemental Complaint [R. 11-12] in which he alleged, on the subject of the action taken by the American Consular officials in Japan, that he filed his application on October 29, 1952 [R. 11]; that the Consular officials did not recognize plaintiff as a citizen of the United States on the day he applied therefor, but instead, on December 29, 1952, executed as to him a Certificate of the Loss of the Nationality of the United States on the ground that he had lost his United States citizenship by reason of his service in the Japanese Armed Forces [R. 12]; and that said Certificate was approved by the Department of State in Washington, D. C., on July 23, 1953 [R. 12.]

Defendant thereupon filed a Motion to Strike and Motion to Dismiss Amended and Supplemental Complaint [R. 13-14]. Defendant asked that the allegations in the Amended and Supplemental Complaint as to the actions taken by the consular officials in Japan and the State Department in Washington, D. C., on plaintiff's application be stricken [R. 13]; said allegation being [R. 12]:

> ". . . Instead, on December 29, 1952, the American Vice Consul at Tokyo executed as to Plaintiff a Certificate of the Loss of the Nationality of the

United States on the ground that Plaintiff had lost his United States citizenship by reason of his said service in the Japanese Armed Forces. Said Certificate was approved by the Department of State in Washington, D. C., on July 23, 1953, and sent to the plaintiff by the said Consular Office on September 25, 1953."

The motion to dismiss portion of defendant's motions was on the ground that the complaint failed to state a claim upon which relief can be granted [R. 13].

In ruling on these two motions, the court *first* granted the motion to strike the portions as requested by defendant [R. 16] and *then*[2] ordered the cause and the petition dismissed [ibid.].

Thereafter, plaintiff filed motions (1) to set aside and relieve plaintiff of (a) the Order of Dismissal and (b) of the Order striking portions of the Amended and Supplemental Complaint [R. 23-24] and (2) for leave of court to file an amendment to the amended and supplemental complaint [R. 17-18]. Prior to the time of the ruling on these motions, plaintiff filed his complaint in No. 1487 [R. 30], the proceedings in which this appeal is taken. Thereafter the court denied plaintiff's motion in No. 1300 to set aside the Order of Dismissal [R. 47]. Notice of Appeal was filed [R. 48]. The appeal was dismissed by stipulation [R. 38].

Thereafter summary judgment for defendant was entered in this case [R. 43]. Hence this appeal.

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[2]The words "first" and "then" are italicized for, as will be seen in the Argument below, this order of events may have a bearing on the outcome of the case.

Specification of Errors.

1. The District Court erred in granting defendant's Motion to Dismiss;

2. The District Court erred in granting defendant's Motion for Summary Judgment;

3. The District Court erred in entering Summary Judgment for defendant.

ARGUMENT.

Summary of Argument.

Without the Government having controverted any factual allegation of plaintiff, including the allegation that plaintiff was born in the United States and that acts stated in the law to be expatriating had not been performed by him voluntarily, and in the face of the clear law that at the minimum plaintiff is at least entitled to his day in court (*Junso Fugii v. Dulles* (C. A. 9, 1955), 224 F. 2d 906) and that this is a case where, before there can be a declaration that a native-born citizen has expatriated himself, the Government has a heavy burden of proof to show by clear, convincing and unequivocal evidence that the act was voluntarily performed (*Nishikawa v. Dulles,* 356 U. S. ....., 2 L. Ed. 2d 659), appellant is faced here with a judgment which, apparently, adjudicates that he is not a citizen of the United States. The basis for this startling state of events is the trial court's ruling that, because a previous case was dismissed by the court *not on the merits,* but on the erroneous view that it had no jurisdiction of the subject of the

action, there is no right to sue in this case for a judgment on the merits.

Whatever else may be the rules of *res judicata,* it is clear that a judgment on the merits cannot be given unless the merits have been adjudicated. Not only was this not done in this case, but the present suit in which this appeal is taken contains allegations, the sufficiency of which was not adjudicated in the previous suit.

Accordingly, plaintiff is entitled not only to a modification of the judgment so as to make clear that it is not a judgment on the merits of the question as to whether he lost his United States citizenship, but he is also entitled to a complete reversal and given his court trial as directed by Congress in 8 U. S. C. 903.

I.

The Savings Clause of the Immigration and Nationality Act of 1952 Preserves the Right to File Suit for a Declaration of Nationality Under 8 U. S. C. 903 Where the Application for Passport or Registration Was Filed Before the Effective Date of the 1952 Act.

The court below apparently did not give consideration to this question raised by defendant's motion to dismiss for lack of jurisdiction [R. 33-34] because it decided the case as one for summary judgment [R. 39, 41, 43]. The point does not require extended discussion, however, because it is clear that the law as contended for by plaintiff has been settled by this court in *Junso Fugii v. Dulles,* 224 F. 2d 906 (1955), where the factual situation before the Consulate was identical with that here.

II.

Summary Judgment, Based on a Previous Case Being Res Judicata, Cannot Be Granted, and Certainly Cannot Be Granted on the Merits, Where the Previous Case Did Not Adjudicate the Merits and Was Dismissed Because of the Court's Erroneous View That It Had No Jurisdiction.

While it is true that the court below recognized [R. 37] the rule to be "that the law and the facts (should) be construed in such a manner as to avoid a loss of citizenship,"[3] it is submitted that in this case the court did just the opposite and construed both the facts and the law strictly against the citizen so as to effect loss of citizenship. The mere statement of the problem posed and the result ordered by the judgment below suggests that if such be the result (plaintiff deprived of his day in court on the merits), there is something wrong with a rule of law which would permit of such injustice. But this case need not be disposed of by *a priori* reasoning; the law itself requires that there be a reversal herein.

A.

The Doctrine of Res Judicata Does Not Apply Unless There Was a Previous Judgment on the Merits.

The rule is thus stated at 50 C. J. S. 51:

> "A judgment in a suit will operate as a bar to a subsequent suit on the same cause of action *if, and only if,* the judgment and the proceedings leading up thereto involved, or afforded full legal opportunity for, an investigation and determination of the merits of the suit." (Italics added.)

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[3]Citing *Schneiderman v. United States,* 302 U. S. 118, 122; *Junso Fugii v. Dulles,* 224 F. 2d 906, 907 (C. A. 9, 1955).

We believe this rule to be a correct statement of the law. Defendant cannot contend in the case at bar that there was an adjudication on the merits. On the contrary he has attempted (thus far successfully) to prevent that very thing.

Corpus Juris Secundum, in support of its statement of the rule, cites many cases, including reference to Judge Haney's concurring opinion in this court's decision in *Suren v. Oceanic S.S. Co.,* 85 F. 2d 324, 325 (C. C. A. 9, 1936):

> "A judgment in the prior action, *unless rendered on the merits,* is not res judicata."

The Supreme Court has spoken on the subject a number of times:

Walden v. Bodley, 14 Pet. (U. S.) 156, 161:

> "As the first bill was dismissed for want of jurisdiction, and the second by the complainants, at rules, in the clerk's office, it is clear that neither can operate as a bar to the present bill. A decree dismissing a bill generally, may be set up in bar of a second bill, having the same object in view; but the court dismissed the first bill on the ground that they had no jurisdiction, which shows that the case was not heard on the merits . . ."

Smith v. McNeal, 109 U. S. 426, 27 L. Ed. 986, 987:

> "It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiffs' right of action."

Hughes v. United States, 4 Wall. (U. S.) 232, 18 L. Ed. 303, 305:

> ". . . If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the

> form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Cf. N.L.R.B. v. Denver Bldg. & Constr. Tr. Council, 341 U. S. 675, 681, 682:

> ". . . We do not agree (that the issue is res judicata). The District Court (in the first case) did not have before it the record on the merits . . ."

This Court is in agreement.

In *Werner v. United States,* 198 F. 2d 882 (C. A. 9, 1952), the first case was dismissed by the District Court for want of jurisdiction over the United States. The Court of Appeals affirmed (188 F. 2d 266). In this second case the United States urged the previous case as a bar. The court rejected the plea and reversed the trial court which had accepted it. The court said (198 F. 2d at 883):

> ". . . Appellant is entitled to his day in court as to whether in his present case he has stated a cause of action and, if he has, whether he has sustained the requisite proof."

In *Sachs v. Ohio National Life Insurance Co.,* 148 F. 2d 128, 132 (C. C. A. 7, 1945), cert. den. 326 U. S. 753, the court said:

> ". . . We think no authority need be cited for the proposition that a ruling is not res judicata when made in a case subsequently dismissed for want of jurisdiction . . ."

Picturesquely putting the proposition, Judge Carpenter, in *Wayne County Securities Co. v. Hughitt,* 228 Fed. 816, 818 D. C. N. D. Ill., 1915) said:

> ". . . (T)he municipal court having dismissed the cause of action for want of jurisdiction, the parties are as if no suit had ever been brought. It is not res judicata of anything."

B.

The Order of Dismissal in No. 1300 Was Not on the Merits.

It cannot be seriously contended that the dismissal in No. 1300 was on the merits. It simply cannot be accepted that the District Court's Order of Dismissal in that case [R. 15-16] before trial was an adjudication that Yoichi Fujii is not a citizen of the United States; that he lost his native acquired citizenship by reason of his military service and voting in Japan and that said military service and voting were voluntary.[4] The rule is that "the party relying upon *res judicata* has the burden of showing that the decree was on the merits." (*Sacks v. Stecker,* 62 F. 2d 65, 67 (C. C. A. 2, 1932).) We do not believe that defendant can point to, or even properly suggest, anything showing that the court in its dismissal of No. 1300 either did, or intended to, adjudicate the substance of plaintiff's claim to citizenship.

To supply this deficiency, reliance is placed [R. 39] on the technical wording of Rule 41(b), to which we now turn.

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[4]Without which, of course, there could be no loss of citizenship (*Perkins v. Elg,* 307 U. S. 325, 334). And in the light of the heavy burden on the Government to *prove* that the conduct was voluntary (*Nishikawa v. Dulles,* 356 U. S. ....., 2 L. Ed 2d 659), the suggestion that the pre-trial dismissal of No. 1300 adjudicated that fact, is without basis.

C.

Rule 41(b), Federal Rules of Civil Procedure, Does Not Apply to the Ruling, Before Trial in No. 1300.

> "The place that Rule 41(b) relating to dismissal of actions occupies in the numerical order of rules, as part of chapter entitled 'Trials,' tends to characterize the rule primarily as controlling the action at or after trial and does not apply to a dismissal of the complaint to insufficient pleading."
>
> 2 Baron & Holtzhoff, Sec. 917, p. 635, n. 5.

The authority for Baron and Holtzhoff's statement is *Russo v. Sofia Bros.*, 2 F. R. D. 80 (D. C. N. Y., 1941). This case has never been questioned and has been cited with approval on the point (*Adams v. Jarka Corporation,* 8 F. R. D. 571, 574 (S. D. N. Y., 1948).

In the *Russo* case, the court said, after quoting Rule 41(b) (2 F. R. D. at 81, 82):

> "Clearly, there has been no trial of the issues. Manifestly all that has heretofore been decided is that the *complaint then before the Court* did not state a cause of action against Lorber. . . . In other words, objectively considered, there has been no disposition of plaintiff's claim on the merits. Are we constrained by a fiction to so treat it by the command of Rule 41?
>
> ". . .
>
> "There is nothing in the note (of the Reporter to the Advisory Committee on the rules) to indicate the applicability of the Rule to a preliminary motion addressed to a pleading. To the contrary, its inapplicability is at least inferentially suggested. . . . These discussions (of the Symposium on the Rules under the auspices of the American Bar Association)

reveal the Rule in its primary function, as a device during trial to prevent the recurrence of litigation that had reached that advanced stage.

". . .

"To extend the operation of this rule to the instant motion would, I believe, create a penalty and a forfeiture which was not contemplated by the framers of the Rule . . ."

D.

A Decision on a Motion to Dismiss for Failure to State a Claim Cannot and Does Not Decide Any Issue of Fact.

Passing from reliance upon Rule 41(b) support is next sought [R. 40] from Rule 12(b)(6).

But this misconceives the function of the motion to dismiss for failure to state a claim. We repeat again our belief in the impossibility for defendant to show that the court either did, or intended to, pass upon the question as to whether plaintiff is or is not a citizen or whether he did or did not lose his citizenship in Japan.[5]

> "If the defendant, whether on demurrer, motion, verdict or otherwise, obtains judgment in his favor on a ground not involving the substance of the plaintiff's cause of action, the cause of action is not extinguished thereby." (Rest. Judgments, p. 194.)

How, then, can it be claimed that the dismissal in No. 1300 involved the substance of the plaintiff's claim?

"The motion (to dismiss for failure to state a claim upon which relief can be granted) raises only a question of law." (1 Baron & Holtzhoff, Sec. 356, p. 642.) How,

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[5]Indeed, the court below acknowledged [R. 39] "that a motion to dismiss cannot be substituted for a trial on the merits."

then, can it be asserted that the facts upon which plaintiff's claim to citizenship is based were passed upon?

"Questions of fact will not ordinarily be determined on such a motion" (*ibid*). Can defendant claim that the Court did determine the facts of plaintiff's claim in its decision dismissing No. 1300? We think not.

E.

The Court's Order of Dismissal in No. 1300 Was Not on the Merits But Was for Lack of Jurisdiction.

We think there can be no real disagreement on this point. In its Order of Dismissal dated September 23, 1954, the Court recited [R. 15-16] that it had granted the defendant's first motion to dismiss "because at the time the instant suit was filed the petitioner had not actually been denied a passport or other right or privilege as a national of the United States." It then recited [R. 16] that it had given plaintiff leave to amend to state such facts. And it then recited [R. 16] that the amended complaint which was filed "contained allegations which were not amendatory matter which the Court allowed or anticipated allowing in the leave to file an amended complaint." Accordingly it granted defendant's motion to strike those supplementary allegations which spoke of a date later than the date of the filing of the complaint. And having granted the motion to strike, the Court then dismissed the complaint [R. 16].[5a]

Thus it is seen that the court's Order of Dismissal can in no way be interpreted as being on the merits.

[5a]It should be pointed out, of course, that this ruling by the District Court was before [Sept. 23, 1954; R. 17] this Court's ruling in *Junso Fujii v. Dulles,* 224 F. 2d 906 (July 14, 1955).

And it is also seen that the order of dismissal of September 23, 1954, was for the same reasons and on the same ground as the Court's May 28, 1954, Ruling on Defendant's Motion to Dismiss. An examination of the Court's May 28, 1954, Ruling is therefore in order.[6]

The May 28, 1954, ruling is stated in terms of "no claim is stated within the meaning of Section 503 of the Nationality Act of 1940" (Appx. A, p. 3). But an examination of the ruling shows that what the court had in mind was that there was no jurisdiction. Thus the court said (Appx. A, p. 2):

> *"Section 503 of the Nationality Act of 1940, 8 USCA Section 903, conferred restricted jurisdiction on this court.* . . . Inasmuch as Section 503 was repealed as of December 24, 1952, the complaint must clearly allege that such denial of a right or privilege had occurred prior to that date . . .
>
> ". . . Nothing in the amended complaint definitely shows that plaintiff had been denied a right or privilege as a national of the United States prior to December 23, 1952, the time the action was instituted. Without such allegation in the amended complaint, no claim is stated within the meaning of Section 503 of the Nationality Act of 1940." (Italics added.)

Thus read[7] it is clear that the basis for the Court's ruling is its belief that it had no jurisdiction. And it is

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[6]Although appellant designated [Clk. Tr. p. 37] that "the complete record and all the proceedings and evidence in the action" be the record on appeal, this order of May 28, 1954, was not transmitted to this Court and, accordingly, is not in the printed record. It is set out hereinafter as Appendix "A."

[7]Even without having in mind the Supreme Court's admonition that in this case the facts and law must be read as reasonably as possible in favor of plaintiff.

likewise manifest that, by the same reasoning, when the Court in its September 23, 1954, Order of Dismissal said [R. 16] "that the complaint does not state a cause of action against the defendant upon which relief can be granted," that ruling was based upon its belief of the *restricted jurisdiction* granted it under Section 503 of the 1940 Nationality Act.

To read the Court's Order of Dismissal [R. 16] as being not on jurisdictional grounds would be to favor form over substance. But this cannot be done. Even in cases not involving citizenship the court will look to substance rather than to form (*Young v. Higbee Co.,* 324 U. S. 204, 209; *Wilkinson v. McKimmie,* 229 U. S. 590; 57 L. Ed 1342, 1343).[8]

So, here.

III.

The Order of Dismissal of No. 1300 Is Not Res Judicata.

A.

A Dismissal for Lack of Jurisdiction Does Not Bar a Subsequent Suit.

Assuming, as we believe to be without question, the Order of Dismissal of No. 1300 was for lack of jurisdiction, that Order does not bar this present suit.

In *Rand v. United States,* 48 Fed. 357, 358 (D. C. Me., 1891) (affd. sub nom. *United States v. Rand,* 53 Fed. 348 (C. A., 1892)) the first case, *Rand v. United States,* 36

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[8]This is true where the motion to dismiss was stated to be for failure to state a claim, but actually was decided by the court on other grounds. In such a case, the second court will look beyond the title to what was actually argued and decided. Cf. *Mullen v. Fitzsimmons, etc.,* 172 F. 2d 601, 602 (C. A. 7, 1948).

Fed. 671 (D. C. Me., 1888), was for certain fees claimed by a Commissioner. As to part of them the United States objected on the ground that the court did not have jurisdiction. The District Court agreed with the Government and disallowed those claims on that ground. No appeal was taken. Later an appellate court decision in another case was rendered to the effect that the court did have jurisdiction over the items. The second suit, *Rand v. United States,* 48 Fed. 357 (D. C. Me., 1891), was also for amounts claimed by the Commissioner and included the *same items* which previously had been rejected for want of jurisdiction in the court. The court held the claims could be proved, saying (48 Fed. at 358):

> ". . . A portion of these items were included in the proceeding by this same petitioner in 1888, and was then, upon authority of *Bliss v. U. S.,* 34 Fed Rep. 781 held not to be within the jurisdiction of this court. *Rand v. U. S.,* 36 Fed. Rep. 671. *Such disposition of the claim for supposed want of jurisdiction to pass upon its merits does not operate as a bar to this petition.* . . ." (Italics added.)

This decision, including its reasoning and conclusions, was affirmed on appeal (53 Fed. 348 (C. C. A. 1, 1892).)

Nor is the *Rand* case alone. In 3 Baron & Holtzhoff, Section 1240, pp. 109-110, it is stated:

> ". . . If the court has no jurisdiction, it has no power to enter a judgment on the merits but must dismiss the action. . . . (O)ne district court, inadvertently perhaps, granted a summary judgment in favor of a defendant upon the ground that the court lacked jurisdiction of the case. Such a judgment like a judgment of dismissal for want of jurisdiction is not res judicata of subsequent action in a court of competent jurisdiction . . ."

Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., 109 Fed. 504, 507-508 (C. C. A. 9, 1901), states the law thus:

> ". . . It (the first suit) was dismissed for want of jurisdiction, and for no other reason. Such a judgment cannot be pleaded in bar. *The matter stands as if no proceedings were ever had. It is as if no suit had ever been brought. It is a blank. No refinement of words, or ingenious argument of learned counsel, can infuse life into proceedings that are dead, null, and void.* In the very nature of the case, it is impossible to sustain the proposition of appellee's counsel that any point was decided by the court by the dismissal that would go to the merits of the action. The fact of dismissal for want of jurisdiction proves conclusively that the case was not heard on its merits. (Italics added.)

"These general principles are well settled. The authorities bearing upon the subject all declare that, where an action is dismissed on the sole ground that the court has no jurisdiction of the subject-matter of the suit or of the parties, there cannot be any jurisdiction of the merits, and no bar to another action for the same cause (citations).

"In Hughes v. U. S., 4 Wall. 232, 237, 18 L. Ed. 303, the court, in discussing this question, said:

> " 'In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground

which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.'

"In Freem. Judgm., supra, it is said:

" 'There can be no doubt that the dismissal of an action for want of jurisdiction is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it.' "

Illinois Central R. Co. v. Mississippi Public Service Commission, 135 Fed. Supp. 304, 306 (S. D. Miss., 1955), stated the general rule thus:

". . . (T)here is no doctrine of exhaustion of judicial remedies. If a judgment of dismissal is rendered on jurisdictional grounds, the losing party may accept it; and, instead of seeking a review, may institute another action where one will not be met by the jurisdictional bar."

And see *Williams v. Minn. Mining & Mfg. Co.,* 14 F. R. D. 1, 8, 9 (S. D. Cal., 1953), where the court said:

"The long settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision upon the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal . . .

"The same rule applies for like reasons to orders made prior to a determination of lack of jurisdiction . . .

"So, also, with respect to findings as to jurisdictional facts made incident to a determination of lack of jurisdiction. These are held not to be res judicata so as to estop a party to assert the contrary in a

collateral proceeding, since the collateral estoppel doctrine is not applicable to such 'incidental' determination of fact."

McNamara v. Home Land & Cattle Co., 121 Fed. 797 (C. C. A. 7, 1903), was an action for damages for breach of contract. The defendant claimed that a previous action on the contract barred the present suit. The court held this not to be the case because there had been no adjudication of the facts of the case. The court said (121 Fed. at 800):

> ". . . Whether we look at the record of that (first) cause, with or without the aid of the printed opinion of the Circuit Court of Appeals, we are convinced, that nothing was ever determined between the parties, save that under the facts and circumstances found by the Circuit Court, a bill in equity would not, as a matter of law, lie for the specific performance of the contract . . . Indisputably, these are the grounds upon which the decree of the Circuit Court of the District of Montana was reversed, and such reversal does not, therefore, embody an adjudication of the facts of the cause."

B.

The Complaint in the Instant Suit Is Different From and Supplies the Allegations the District Court Found Missing in No. 1300 on the Basis of Which It Had Rendered Its Order of Dismissal in That Case.

The rule is thus stated in Restatement of Judgments, Section 54:

> "Where a judgment is rendered for the defendant on the ground of the non-existence of some fact essential to the plaintiff's cause of action, the plaintiff is not precluded from maintaining an action after such fact has subsequently come into existence."

Under Comment (a), *Rationale,* the Restatement says (pp. 211-212):

> "The principle that where a fair opportunity has been afforded to the parties to litigate a claim, and the court has finally decided the controversy, the interests of the state and of the parties require that the validity of the claim shall not be again litigated by them, is not applicable to the situation stated in this Section. Where a judgment in favor of the defendant is rendered on the ground that the plaintiff's action is prematurely brought, the plaintiff is not precluded from maintaining an action after the claim has matured. A determination by the court that the plaintiff had no enforceable cause of action at the time when the action was brought is not a determination that he may not have an enforceable cause of action thereafter, and does not preclude him from maintaining an action when his cause of action has become enforceable."

Under Comment (c), it is stated (p. 213):

> "The rule stated in this Section is applicable where the liability of the defendant is conditioned upon the happening of some event. In such a case if the plaintiff brings an action before the event has occurred, and judgment is given for the defendant on that ground, the plaintiff is not precluded from maintaining an action after the event has occurred . . ."

And, finally, under Comment (f) it is said (p. 216):

> "The rule stated in this Section is applicable although the court in the first action was in error in

dismissing the action on the ground that it was prematurely brought."[9]

It is submitted that the instant case comes within the Restatement rule.

Thus the Court dismissed No. 1300 "because at the time the instant suit was filed the petitioner had not actually been denied a passport or other right or privilege as a national of the United States" [R. 15-16]. This was the same ground upon which the Court ruled (Appx. A, p. 2) on defendant's first motion to dismiss [R. 6-7], the said motion being posited on the ground that no determination having been made by the Consulate, "this is fatal to Plaintiff's cause of action because a prerequisite to a suit under 8 U. S. C. 903 is that the Plaintiff be denied 'a right or privilege as a national of the United States . . . upon the ground that he is not a national of the United States.' "[10]

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[9]See also Restatement of Judgments, Sec. 67:

"Where in an action the Court holds that the plaintiff cannot enforce a particular claim in that action on the ground that he can enforce it only in a separate action, the judgment does not preclude the plaintiff from enforcing the claim in another action, although in the second action it appears that the holding of the court in the first action was erroneous."

Under Comment (a) of this section, it is stated (p. 287):

"It is immaterial that the plaintiff did not appeal from the ruling of the court in the first action. Where the plaintiff is defeated in the first action by an erroneous ruling on the merits of his claim and he takes no further steps in the action to have the judgment reversed, he is bound by the judgment, and cannot maintain a second action to enforce his claim. . . . The situation is different, however, where the ruling is based not on a denial of his claim . . . but only upon his right to recover in the particular action."

[10]The quotation is from defendant's Memorandum of Points and Authorities filed in support of the motion.

As noted, on the court's first ruling, defendant's theory was followed, the court holding (Appx. A, p. 2):

> "Nothing in the amended complaint definitely shows that plaintiff had been deined a right or privilege as a national of the United States prior to December 23, 1952, the date the action was instituted."

Thereafter plaintiff filed an Amended and Supplemental Complaint [R. 11-12]. Defendant filed [R. 13] a Motion to Dismiss this Amended Complaint. The grounds for this Motion, as stated by defendant [R. 13], were "that the Amended and Supplemental Complaint fails to cure the defects contained in the previous Complaint, which defects were found by Judge Wiig to justify granting defendant's motion to dismiss." Or stated another way that plaintiff had prematurely brought his suit.

However, the instant case was brought and filed after there had been a denial and the complaint so alleges [R. 26-30]. The case, therefore, comes within the rule stated by the Restatement of Judgments, Section 54 (*supra,* p. 22).

In the Amended and Supplemental Complaint in No. 1300 [R. 11-12] plaintiff alleged matters, supplemented to the date he filed his suit, which were allegations of fact showing a denial. But *the court struck these allegations,* not because a complaint containing such allegations would not state a claim upon which relief could be granted but because the allegations "were not amenda-

tory matter which the Court had allowed or anticipated allowing in the leave to file an amended complaint."[11]

Thus it must be held that the order of dismissal was based upon the complaint *then* before the court and which, in the court's view, showed that as of the date of filing, there had been no denial. This was a ruling, therefore, that the suit had been prematurely filed.

The court did not discuss and did not rule [R. 15-16] upon whether a suit filed after there had been a denial would state a claim upon which relief could be granted nor did it rule upon or discuss the effect of the Savings Clause (Sec. 405(a)) of the Nationality Act of 1952.

The case, therefore, comes even within the language in *Ripperger v. A. C. Allyn & Co.,* 37 Fed. Supp. 373, 374 (S. D. N. Y., 1940):

> ". . . (N)or will in (a dismissal on the ground of lack of jurisdiction) bar a second suit where the pleader in the prior suit failed to allege essential jurisdictional facts which alter his plea in a new pleading."

Plaintiff did precisely that in the present suit. He alleged the jurisdictional facts which the court found lacking in the first suit. It must be remembered that the Court in its order of dismissal of September 23, 1954 [R. 15-16] did *not* rule that a complaint which alleged

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[11]Cf. *Williams v. Minn. Mining & Mfg. Co.,* 14 F. R. D. 1, 9 (S. D. Cal., 1953): "The same rule (not a bar to a second suit) applies for like reasons to orders made *prior* to a determination of lack of jurisdiction." The court's striking the supplementary allegations *before* it held no claim was stated, comes within this rule.

an application for registration before the American Consulate on October 29, 1952, an execution of a Certificate of Loss on December 29, 1952, and approval of same by the State Department in Washington on July 23, 1953, did not state a claim upon which relief can be granted. The *only* thing the court's order of dismissal of September 23, 1954 [R. 15-16] held was that a complaint which alleged that plaintiff applied to be registered as a citizen before the American Consulate on October 29, 1952, and that said Consular officials did not register plaintiff as a citizen of the United States on the day he applied therefor, did not state a claim upon which relief could be granted. That was the effect of the Court's ruling and no more. And since the missing allegations have now been supplied, the order of dismissal is no bar. It will be remembered that it was not until *after* the Court ordered stricken the allegations subsequent to December 23, 1952, that it dismissed the complaint [R. 16].[12]

Mack v. United States, 29 Fed. Supp. 65 (D. C. E. D. S. Car., 1939), is a case of interest here. The action was on a War Risk Insurance Policy. In the first case, trial of the case was reached and the Court dismissed it by the following order (p. 66):

> "It appearing that suit was filed in this case before the plaintiff had secured a *denial* of her claim by the Veterans Administration; and that this court is therefore without jurisdiction to hear and determine plaintiff's alleged cause of action.

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[12]See quotation from *Williams v. Minn. Mining & Mfg. Co.*, 14 F. R. D. 1, 9 (S. D. Cal., 1953), *supra,* note 11.

"It is therefore ordered that the complaint herein be dismissed." (Italics added.)

The second suit was on the same claim *after* there had been a denial of plaintiff's claim. The bar of *res judicata* was interposed. Ruling against the Government's contention, the court said (29 Fed. Supp. at 67, 68):

". . . The dismissal in this case, under the order above quoted, was because the Court had no jurisdiction to hear and determine plaintiff's case, *the suit having been filed prior to the date of the disagreement.* (Italics added.)

"By the great weight of authority in both the State and Federal Courts a dismissal on jurisdictional grounds does not deprive the plaintiff of bringing another action . . .

"From the foregoing cases, and many others which have been carefully considered, the court concludes that a dismissal for lack of jurisdiction, such as nonexistence of a disagreement is a dismissal 'not affecting the merits.' In the present case I am satisfied that the dismissal of the original suit did not go to the merits."

This Court's decision in *Johnson v. United States,* 68 F. 2d 588 (C. C. A. 9, 1934), was relied upon in the *Mack* case.

Accordingly, the first case (No. 1300) having been dismissed on jurisdictional grounds because filed prematurely, it is no bar to this suit.

C.

A Suit for a Judgment Declaring One to Be a Citizen, Where a Previous Suit Filed Before the 1952 Act Was Dismissed for Lack of Jurisdiction, Can Be Filed and Maintained After the 1952 Act Went Into Effect, the Previous Suit Not Being Res Judicata.

The authority for this proposition is *Brownell v. We Shung,* 352 U. S. 180. In 1949 the Board of Immigration Appeals ruled that plaintiff was not a citizen of the United States.[13] We Shung sought judicial review of this order by means of a suit for declaratory relief filed *before* the effective date of the 1952 Act. The lower courts denied relief on the *merits* (103 Fed. Supp. 507, 207 F. 2d 132). The Supreme Court vacated the judgment and remanded with instructions to dismiss for lack of jurisdiction on the theory that only habeas corpus was available (346 U. S. 906). After the passage of the 1952 Act, We Shung again sought judicial review by way of declaratory judgment and the court held he was entitled thereto.

We think the *We Shung* case requires a ruling in plaintiff's favor herein. It will be noted that plaintiff in *We Shung* filed precisely the same action the second time and asked for precisely the same relief. The same, identical 1949 order of the Board of Immigration Appeals was sought to be reviewed in the same manner in the second case as in the first. The court did not permit

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[13]The issue rose by way of We Shung seeking admission to the United States as the son of an American citizen.

the ruling on the first case to be a bar to the second. This is especially important and significant in view of the Government's argument in its brief in the case. Thus the Government argued (Br. p. 45):

> "The issue of respondent's right to bring a declaratory judgment was in effect adjudicated against him in the prior proceedings before this court."

As seen, the Supreme Court rejected this argument. It is true that the Supreme Court in its opinion said (352 U. S. at 181): "We conclude that either remedy (habeas corpus or declaratory judgment) is available in seeking review of such orders. This makes it unnecessary for us to pass upon other questions raised by the parties." However, as seen, the Government in effect raised the issue of *res judicata* and, had it had merit, it is to be assumed the Supreme Court would have so held and disposed of the case on that ground.[14]

Conclusion.

The judgment should be reversed. At the minimum, the judgment should be modified so as to make clear that the judgment is not on the merits of the question as to whether plaintiff lost his United States citizenship by reason of his Japanese Military Service or voting.[15]

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[14]In its Petition for Writ of Certiorari in the *We Shung* case, p. 5, the Government said that though the Court of Appeals had ruled the prior case *not res judicata*, it was not contesting the point here. But, as seen, it did in its Brief, after certiorari was granted, in effect raise the matter again. And if it did not contest the point, the concession is of even greater force.

[15]If this minimum relief is granted, it will at least enable plaintiff to pursue 8 U. S. C. 1503(b) and (c).

Otherwise plaintiff will have been adjudged expatriated without ever having had a day in court and without the Government having even attempted to carry the burden of proof required of it in expatriation cases (*Nishikawa v. Dulles,* 356 U. S. ....., 2 L. Ed. 2d 659).

Respectfully submitted,

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APPENDIX "A".

In the United States District Court for the District of Hawaii.

Yoichi Fujii, Plaintiff, v. John Foster Dulles, Secretary of State of the United States of America and the United States Department of State, Defendants. Civil No. 1300.

Ruling on Motion to Amend and Motion to Dismiss Complaint.

Plaintiff filed this action under Section 503 of the Nationality Act of 1940, 8 USCA Section 903, on December 23, 1952. His complaint seeks a judgment declaring him to be a national of the United States of America. On December 2, 1953, plaintiff filed a motion for leave to file an amended complaint. However, in the interim, defendant had filed a motion to dismiss the complaint. Rule 15(a) of the Federal Rules of Civil Procedure, 28 USCA, provides in part:

> "A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served * * *."

A motion to dismiss is not a "responsive pleading" within the meaning of Rule 15(a). United States v. Newbury Mfg. Co., 123 F. 2d 453, 454 (1 Cir. 1941); Kelly v. Delaware River Joint Commission, 187 F. 2d 93, 94 (3 Cir. 1951), cert. denied 342 U. S. 812 (1951). Apparently, this is plaintiff's first attempt to amend his complaint. Therefore, under Rule 15(a), the motion for leave to file an amended complaint must be granted as a matter of course. Whittemore v. Continental Mills, 98 F. Supp. 387 (D. Me. 1951).

Defendant's motion to dismiss the complaint is based on the ground that it fails to state a claim upon which

relief can be granted. Rule 12(b)(6), Federal Rules of Civil Procedure. A close scrutiny of the complaint, as amended, justifies the granting of the motion to dismiss.

Section 503 of the Nationality Act of 1940, 8 USCA Section 903, conferred restricted jurisdiction on this Court. To state a Section 503 claim, the complaint must allege that the alleged national was denied a right or privilege as a national by a governmental department or agency, or an executive official thereof, upon the ground that he is not a national of the United States. See Dulles v. Lee Gnan Lung, No. 13,695 (9 Cir., March 30, 1954). Inasmuch as Section 503 was repealed as of December 24, 1952, the complaint must clearly allege that such denial of a right or privilege had occurred prior to that date. See Suga v. Dulles, No. 1313 (D. Hawaii, January 27, 1954).

Paragraph IV of the amended complaint is devoid of any date. It is alleged that "quite some time before the filing of this suit," the plaintiff sought to secure a passport from the American Consulate in Tokyo, Japan; that the plaintiff was issued a "Certificate of the Loss of Nationality of the United States"; and that the refusal to issue plaintiff a passport is a denial of plaintiff's rights and privileges as a United States citizen. Nothing in the amended complaint definitively shows that plaintiff had been denied a right or privilege as a national of the United States prior to December 23, 1952, the date the action was instituted.[1] Without such allegation in the

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[1]Footnote 1 of plaintiff's memorandum in support of motion for leave to file amended complaint indicates that the Department of State approved the issuance of a Certificate of the Loss of Nationality of the United States on July 23, 1953. However, such fact outside the pleadings was not considered in ruling on the motion to dismiss.

amended complaint, no claim is stated within the meaning of Section 503 of the Nationality Act of 1940.

The state of the amended complaint and the reasoning for this ruling do not require any discussion of the savings clause, Section 405 of the Immigration and Nationality Act (1952), 8 USCA Section 1101 note.

For the reasons stated above, defendant's motion to dismiss the amended complaint is granted. Plaintiff will have thirty days from the date of the filing of this ruling to amend the complaint if he can plead facts which will state a claim upon which relief can be granted.

Dated at San Diego, California, this 26 day of May, 1954.

Jon Wiig (Stated)
Jon Wiig
United States District Judge.